Supreme Court, U.S.
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No. _____

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

ROGER W. PIPKIN, III,
Petitioner,
v.
MORTGAGE CREDITCORP, INC., WESTMARK MORTGAGE CORPORATION, MIDLAND MORTGAGE CO., MIDFIRST BANK S.S.B., NORTHWEST BANK,
Respondents,
v.
GOVERNMENT NATIONAL MORTGAGE ASSOCIATION,
Third-Party Defendant, Respondent.

Petition For A Writ of Certiorari To The United States Court Of Appeals ForThe Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

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39 pp

QUESTION PRESENTED

This case involves the rights of a judgment creditor to enforce a judgment against certain real estate mortgages which, according to the real property records of the jurisdiction in which the property is located, are owned by the judgment debtor, when the Government National Mortgage Association claims ownership by an unrecorded assignment of the mortgages, and whether the applicable federal law preempts the state real property recording statutes. The question presented is:

I. Does 12 U.S.C. § 1721(g), part of the enabling statute of the Government National Mortgage Association (GNMA), preempt Texas Property Code § 13.001(a), and thereby exempt GNMA from recording in the public real estate records conveyances of real property interests and allow GNMA to deprive a judgment creditor of its right to execute against those real property interests by reason of the unrecorded conveyances, even though state law provides that such unrecorded conveyances are void as to the judgment creditor.

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Petitioner, Roger W. Pipkin, III, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

CITATION TO THE OPINION BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit is unpublished, but was issued December 18, 1995, under Cause No. 94-6443, and is attached to this petition as Appendix A. The order denying rehearing was filed March 14, 1996, and is attached as Appendix B. The appeal to the Court of Appeals was from the Order and Judgment, filed November 9, 1994, by the United States District Court for the Western District of Oklahoma, attached hereto as Appendix C.

JURISDICTION

The judgment of the United States Court of Appeals for the Tenth Circuit was issued on December 18, 1995, and rehearing was denied on March 14, 1996. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS INVOLVED

This case involves:

1. U.S. Const. Art. VI, Clause 2:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

2. 12 U.S.C § 1721(g), which provides in pertinent part:

> The Association is hereby empowered, in connection with any guaranty under this subsection, whether before or after any default, to provide by contract with the issuer for the extinguishment, upon default by the issuer, of any redemption, equitable, legal or other right, title, or interest of the issuer in any mortgage or mortgages constituting the trust or pool against which the guaranteed securities are issued; and with respect to any issue of guaranteed securities, in the event of default and pursuant otherwise to the terms of the contract, the mortgages that constitute such trust or pool shall become the absolute property of the Association, subject only to the unsatisfied rights of the holders of the securities based on and backed by such trust or pool. No state or local law, and no federal law (except Federal law enacted expressly in limitation of this subsection after October 8, 1980) shall preclude or limit the exercise by the Association of (A) its power to contract with the issuer on the terms stated in the preceding sentence, (B) its rights to enforce any such contract with the issuer, or (C) its ownership rights as provided in the preceding sentence, in the mortgages constituting the trust or pool against which the guaranteed securities are issued.

3. Texas Property Code § 13001(a) which provides:

> A conveyance of real property or an interest in real property or a mortgage or deed of trust is void as to a creditor or to a subsequent purchaser for a valuable consideration without notice unless the instrument has been acknowledged, sworn to, or proved and filed for record as required by law.

STATEMENT OF THE CASE

Roger W. Pipkin, III obtained a judgment in the amount of $4,875,478, plus interest, against Mortgage Creditcorp, Inc. and Westmark Mortgage Corporation from the District Court of Harris County, Texas, on April 6, 1994. By searching the applicable real property records, Pipkin then learned of real property mortgages secured by interests in real property located in Texas in favor of the judgment debtors. By searching other records, Pipkin learned that Midland Mortgage Co., Midfirst Bank S.S.B. and Northwest Bank (all located in Oklahoma) held possession of the mortgages that were owned, at least in so far as the real property records reflected, by the judgment debtors.

Learning that these parties in Oklahoma held property of the judgment debtors, Pipkin filed his judgment in Oklahoma and sought a writ of execution from the appropriate state court, the District Court of Oklahoma County, Oklahoma. He caused the execution papers to be issued and served on the Oklahoma holders of the property. These Oklahoma holders filed a petition in intervention and joined the Government National Mortgage Association (GNMA) as a third party defendant. GNMA then removed the action to the United States District Court for the Western District of Oklahoma.

GNMA asserted its ownership of the mortgages, claiming that the mortgages had been assigned to it by the judgment debtors by virtue of unrecorded assignments. Since the mortgages were secured by Texas real property, Texas law controlled, and Pipkin asserted that Texas Property Code § 13.001(a) specified that any unrecorded assignments were void as against him. GNMA in turn asserted that this section of the Texas Property Code was preempted by a federal

statute, 12 U.S.C. § 1721(g), and that GNMA therefore had no obligation to file conveyances of real property interests in the real property records.

HOW THE QUESTION PRESENTED WAS DECIDED BELOW

GNMA filed a motion for summary judgment and a motion to quash and dismiss execution proceedings before the United States District Court. The District Court granted both motions, holding that 12 U.S.C. § 1721(g) expressly preempted Texas Property Code § 13.001(a). On appeal to the United States Court of Appeals for the Tenth Circuit, the Court affirmed, agreeing that the federal statute expressly preempted the state statute.

REASONS WHY THE WRIT SHOULD BE GRANTED

This Court should review the determination of the United States Court of Appeals for three reasons:

(1) The decision of the Court of Appeals incorrectly construes the meaning of 12 U.S.C. § 1721(g) when it holds that this section expressly preempts the Texas recording statute;

(2) The decision of the Court of Appeals conflicts with relevant decisions of this Court, which hold that (a) there is a presumption against preemption of the valid exercise of a state's police power, and, thus, any federal law which is asserted to preempt such a state law must be strictly, and narrowly, construed; and (b) preemption should not be found where there is no irreconcilable conflict between the state and federal law; and

(3) The decision of the Court of Appeals decides an important question of federal law that should be determined by this Court when it holds that GNMA is exempt from all state recordation statutes, thereby destroying the ability of all other persons to rely upon the validity of the local real property records.

I. THE EXPRESS LANGUAGE OF 12 U.S.C. § 1721(g) SHOULD NOT BE CONSTRUED TO PREEMPT TEXAS PROPERTY CODE § 13.001(a).

The question whether a certain state law is preempted by a federal law is one of congressional intent. *Gade v. National Solid Wastes Management Association*, 505 U.S. 88, 112 S.Ct. 2374 (1972). Stated another way, the question is one of statutory intent, and the examination must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose. *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 112 S.Ct. 2031 (1992). However, before the Court can begin the task of statutory construction, certain rules affecting the construction must be considered.

In this case, the Court must consider the presumption against preemption. Obviously, state law has always controlled questions of real property conveyances within the jurisdiction of the state and the question of priority among competing lien claimants to the same assets. There can hardly be an area of law that is more traditionally occupied by the state than that area involved in the Texas recordation statute. In fact, the Texas courts have said of the state statute at issue that "(t)his statute ... has been a part of our jurisprudence since before Texas was a state." *Gibraltar Savings Association v. Martin*, 784 S.W.2d 555, 557 (Tex.

App--Amarillo, 1990, writ denied). Where the area of law is one that has generally been occupied by the state, this Court has said:

> Congress legislated here in a field which the States have traditionally occupied. (*Citations omitted*). So we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.

Rice v. Sante Fe Elevator Corp., 331 U.S. 218, 67 S.Ct. 1146, 1152 (1947). Cf. *Hillsborough County, Florida v. Automated Medical Laboratories, Inc.*, 471 U.S. 707, 105 S.Ct. 2371, 2376 (1985) (presumption that state or local regulation of matters related to health and safety is not invalidated under the Supremacy Clause); *Cippolone v. Liggett Group, Inc.*, 505 U.S. 504, 112 S.Ct. 2608, 2618 (1992) (must construe the federal statute in light of the presumption against the preemption of state police power regulations).

The presumption against preemption in this case can only be overcome by the "clear and manifest purpose of Congress." *Rice v. Santa Fe Elevator Corp., supra.* Accordingly, "the presumption reinforces the appropriateness of a narrow reading of (the federal statute)." *Cippolone*, 112 S.Ct. at 2618.

Furthermore, the Court has recognized that it should not seek out conflicts between state and federal regulation where none clearly exists. *English v. General Electric Co.*, 496 U.S. 72, 110 S.Ct. 2270 (1990), *citing Huron Portland Cement Co. V. Detroit*, 362 U.S. 440, 80 S.Ct. 813 (1960). The Court has failed to find preemption where there is no actual conflict, and where it is possible to comply with both

federal and state law. *Freightliner Corp. V. Myrick*, ___ U.S. ___ , 115 S.Ct. 1483, 1488 (1995).

In this case, GNMA argues that a Texas statute is preempted by 12 U.S.C. § 1721(g). Section 1721 is that section pertaining to the "Management and liquidation functions of GNMA". Subsection (g) deals with the rights of GNMA against an issuer of securities guaranteed by GNMA upon default by the issuer. That portion of § 1721(g) relevant to this inquiry is:

> The Association is hereby empowered, in connection with any guaranty under this subsection, whether before or after any default, to provide by contract with the issuer for the extinguishment, upon default by the issuer, of any redemption, equitable, legal or other right, title, or interest of the issuer in any mortgage or mortgages constituting the trust or pool against which the guaranteed securities are issued; and with respect to any issue of guaranteed securities, in the event of default and pursuant otherwise to the terms of the contract, the mortgages that constitute such trust or pool shall become the absolute property of the Association, subject only to the unsatisfied rights of the holders of the securities based on and backed by such trust or pool. No state or local law, and no federal law (except Federal law enacted expressly in limitation of this subsection after October 8, 1980) shall preclude or limit the exercise by the Association of (A) its power to contract with the issuer on the terms stated in the preceding sentence, (B) its rights to enforce any such contract with the issuer, or (C) its ownership rights, as provided in the preceding sentence, in the mortgages constituting the trust or pool against which the guaranteed securities are issued.

The state statute that was held to be preempted is Texas Property Code § 13.001(a), which provides that an unrecorded conveyance of an interest in a mortgage is void as to a judgment creditor. The effect of the decision below is to hold that Pipkin, a judgment creditor, is deprived of his right to execute against mortgages assigned to GNMA by the judgment debtor, even though GNMA failed to record those assignments. This holding is based upon the decision that the state statute which would void the unrecorded assignment as against the judgment creditor would preclude or limit GNMA's ownership rights in the mortgages, and thus is preempted by the federal law. However, this reading of the federal statute strains its literal meaning, ignores the presumption against preemption, is clearly not a narrow reading of the federal statute, and finds a conflict between the federal and the state statute where the supposed conflict is easily reconciled.

The above quoted portion of the federal statute contains only two sentences. The first sentence clearly provides that GNMA is empowered to contract with an issuer; that, upon default by the issuer, any interest of the issuer in the mortgages would be extinguished; and that the mortgages shall then become the absolute property of GNMA. The second sentence was held by the Court of Appeals to constitute the express preemption. It provides that no local or state law shall preclude or limit the exercise by GNMA of (A) its power to contract as provided in the preceding sentence, (B) its power to enforce its contract with its issuer, or (C) its ownership rights as provided in the preceding sentence.

Thus, the two sentences set forth above deal entirely with GNMA's contracts with its issuer, and it's ability to obtain, without interference from the issuer, ownership of the mortgages. Nothing in either sentence explicitly or implicitly

refers to anyone other than GNMA, an issuer, or the holder of the securities backed by the mortgages. The second sentence states that no state law shall preclude or limit GNMA's ownership rights *as provided in the preceding sentence* (emphasis added). The ownership rights provided in the preceding sentence are GNMA's rights under its contract with its issuer, not GNMA's rights against any third party. The literal reading of the federal statute does not in any way involve a third party claiming an interest in the mortgages; the statute deals only with the parties to the transaction, i.e. GNMA, the issuer, and the holders of the securities backed by the mortgages. Had Congress wanted to clearly express its intent that GNMA need not comply with state recording statutes, it could have done so in a much more forthright manner.

There is very little jurisprudence construing § 1721(g). However, one federal District Court considered the construction of this section in determining whether it could enjoin GNMA from certain actions with regard to its coinsurance obligations to an issuer. That Court recognized that this section dealt solely with GNMA's rights to contract with its issuers:

> Although the legislative history is silent on this point (footnote omitted), the words chosen by Congress are clear. They manifest a desire not to insulate all actions relating to default from judicial review but rather to assure that GNMA would be able to contract with issuers to provide for default were it necessary.

DRG Funding Corp. v. Secretary of Housing and Urban Development, 1988 WL 90107, at 5 (D.D.C. 1988).

Obviously, the state and federal statutes are easily reconciled. To have protected its interest, GNMA need only

have recorded its assignments, as does every other assignee of a Texas[1] mortgage interest. Thus, there is no actual conflict between the state and federal law, even if the federal law is given the meaning for which GNMA argues. Texas' recording statute certainly does not "preclude" GNMA's ownership of the mortgages, since it requires only that GNMA record its interest.

Furthermore, Congress cannot have intended to exempt GNMA from all state regulation of conveyances in real property interests. For instance, what is the effect of this ruling upon the statute of frauds, as it exists in almost every state, which requires conveyances of real property interests to be in writing? Presumably, to hold that § 1721(g) preempts all state limits on GNMA's claim of ownership would also require a finding that the statute of frauds was preempted as to GNMA. Accordingly, if GNMA alleges an oral assignment of mortgages that would be prohibited by state law, that prohibition would also be an impermissible limitation upon GNMA's ownership, and the state statute of frauds would be preempted.

The clear effect of this ruling is to eliminate the ability of any party to rely upon the state real property records. In the simple situation of the sale of a house, the buyer can no longer be sure that he is obtaining a release of the prior mortgage from the legal holder of the mortgage. There is now the possibility in every such transaction that the assignment of the mortgage to GNMA is unrecorded. How does the buyer make sure that the recorded owner of the mortgage is still the owner? Is GNMA going to offer a certification that it is not an unrecorded holder of an interest to allow every single real estate transaction in the country to

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[1] All fifty states have some state recording statute, many of which are very similar to the Texas statute.

close? If the federal law exempts GNMA from recording its interest, there can only be utter chaos. It is not reasonable to assume that Congress intended such a result.

The holding of the Court of Appeals misconstrues the literal meaning of the federal law by holding that it expressly preempts a state statute dealing with the rights of third parties; the ruling fails to narrowly construe the federal statute as required because of the presumption against preemption of the state act; the ruling finds a conflict between the state and federal law where one does not exist; and it creates results that could not have been intended by Congress.

CONCLUSION

For the foregoing reasons, this Court should grant review of the judgment of the United States Court of Appeals for the Tenth Circuit.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

ROGER W. PIPKIN, III,	)	
Plaintiff-Appellant,	)	
	)	
v.	)	
	)	No. 94-6443
MORTGAGE CREDITCORP,	)	(D.C. No.
INC.; WESTMARK	)	CIV-94-901-W)
MORTGAGE CORPORATION,	)	
Defendants,	)	(W.D. Oklahoma)
	)	
and	)	
	)	
MIDLAND MORTGAGE CO.;	)	
MIDFIRST BANK S.S.B.;	)	
NORTHWEST BANK,	)	
Defendants-Appellees,	)	
	)	
v.	)	
	)	
GOVERNMENT NATIONAL	)	
MORTGAGE ASSOCIATION,	)	
Third-Party Defendant-Appellee.	)	

ORDER AND JUDGMENT*

Before MOORE, BRORBY, and EBEL, Circuit Judges.

This appeal presents the question whether a default judgment creditor may divest the interest of Government National Mortgage Association (GNMA) in certain Texas real estate mortgages solely because GNMA failed to record its interest in the mortgages in adherence to state law. Plaintiff Roger W. Pipkin, III appeals the district court's grant of summary judgment in favor of GNMA and its mortgage servicers, Midland Mortgage Co., MidFirst Bank, S.S.B., and Northwest Bank (the Midland Group). The district court held Texas law was superseded by GNMA's enabling statute and Mr. Pipkin was not entitled to execute upon the Texas mortgages because GNMA owned the mortgages as a matter of law. We agree and affirm.

Mr. Pipkin is the judgment creditor of defendants Mortgage Creditcorp, Inc. and Westmark Mortgage Corporation (the WestMark Parties), two defunct mortgage servicing companies. In 1994, Mr. Pipkin obtained a $4.8 million default judgment against the Westmark Parties in a Texas state court. That court then entered a post-judgment

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* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. The court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of the court's General Order filed November 29, 1993. 151 F.R.D. 470.

order instructing the Midland Group, the defendants-in-intervention and third-party plaintiffs, to turn over to Mr. Pipkin several Texas real estate mortgages which the court deemed "nonexempt assets of the [Westmark Parties]."

To execute his judgment on the Oklahoma-based Midland Group, Mr. Pipkin filed the post-judgment order in Oklahoma City, Oklahoma. Subsequently, the Midland Group obtained a stay of execution from the state district court of Oklahoma County, and filed a petition in intervention naming GNMA as third-party defendant. GNMA removed the case to the United States District Court for the Western District of Oklahoma.

There, GNMA and the Midland Group moved for summary judgment, arguing the mortgages sought by Mr. Pipkin were owned by GNMA, not the Westmark Parties. Mr. Pipkin countered that, under Texas law, the Westmark Parties continued to own the mortgages because GNMA failed to record its interest in the mortgages. The district court granted GNMA's and the Midland Group's motions on the ground that GNMA's enabling statute, 12 U.S.C. § 1721(g), expressly preempts any Texas law limiting GNMA's ownership rights in the mortgages.

I.

GNMA is a creature of statute. Under GNMA's enabling statute, Section 1721(g), Congress vested GNMA with broad powers to carry out the congressional objective of establishing and encouraging a secondary market for home mortgages. Section 1721(g) provides:

> The Association [GNMA] is hereby empowered, in connection with any guaranty under this subsection, whether before or after any default, to provide by

> contract with the issuer for the extinguishment, upon default by the issuer, of any redemption, equitable, legal, or other right, title, or interest of the issuer in any mortgage or mortgages constituting the trust or pool against which the guaranteed securities are issued; and with respect to any issue of guaranteed securities, in the event of default and pursuant otherwise to the terms of the contract, *the mortgages that constitute such trust or pool shall become the absolute property of the Association subject only to the unsatisfied rights of the holders of the securities based on and backed by such trust or pool. No State or local law, . . . shall preclude or limit the exercise by the Association of* (A) its power to contract with the issuer on the terms stated in the preceding sentence, (B) *its rights to enforce any such contract with the issuer, or* (C) *its ownership rights, as provided in the preceding sentence, in the mortgages constituting the trust or pool . . . .*

12 U.S.C. § 1721(g) (1) (emphasis added).

GNMA is a government corporation within the United States Department of Housing and Urban Development. It operates a mortgage-backed securities program (MBS Program) to attract investors into the private mortgage market. Under the MBS Program, GNMA authorizes certain private entities (Issuers) to assemble pools of qualified mortgages and to issue securities based on and backed by these pools of federally insured or guaranteed mortgages. The mortgage-backed securities entitle investors to timely payment of principal and interest.

Issuers are responsible for ensuring timely principal and interest payments are made to investors. However, to make these securities more attractive to investors, GNMA

guarantees payment if the Issuers default. This guarantee is backed by the full faith and credit of the United States. Therefore, the United States is liable to the holders of the mortgage-backed securities if the Issuers fail to make payment when due.

The pool of private mortgages provides the source of funds and the primary security for the principal and interest payments. Thus, to protect its interest, GNMA requires Issuers to enter into a contractual agreement with GNMA to convey to GNMA the title of the Issuers to the mortgages. Issuers retain nominal interest in the mortgages to enable them to carry out servicing functions in connection with the mortgages.

All GNMA contracts also empower GNMA to declare the Issuers in default under the MBS Program in certain instances. Upon GNMA's declaration of default, by letter directed to the Issuers, GNMA may divest the Issuers of any interest in the pooled mortgages. Upon the exercise of the divestiture, the pooled mortgages become the absolute property of GNMA, subject only to unsatisfied rights of the holders of the securities backed by the pooled mortgages.

The Westmark Parties were Issuers in GNMA's MBS Program until October 1989 when GNMA declared them in default. At that time, GNMA assumed ownership of the mortgages and took over the obligation to make the principal and interest payments previously made by the Westmark Parties. However, as the parties here agree, GNMA did not take steps to record its interest in the Texas mortgages.

II.

With these facts at hand, we first turn to whether the district court properly granted GNMA's motion for summary

judgment holding the Texas recording statute preempted by GNMA's enabling law. We review a district court's grant of summary judgment de novo. *Committee for the First Amendment v. Campbell*, 962 F.2d 1517, 1521 (10th Cir. 1992). Summary judgment is appropriate if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Fed. R. Civ. P. 56(c).*

Mr. Pipkin contends by virtue of the Texas recording statute and GNMA's failure to record its interest in the pooled mortgages, the Westmark Parties own those mortgages under Texas law. As a judgment creditor of the Westmark Parties, Mr. Pipkin argues he is entitled to execute on those mortgages.

Mr. Pipkin asserts § 1721(g) does not preempt Texas Property Code Section 13.001(a), which he claims requires GNMA to record its interest in the mortgages.[1] Moreover, Mr. Pipkin argues, the Texas recording statute does not limit GNMA's rights under § 1721(g). In his view, the Texas law protects the rights of third parties by requiring GNMA to record its ownership rights. Therefore, he argues, because GNMA failed to record any assignment of the Westmark Parties' mortgages, GNMA cannot claim rights superior to those the Texas law protects.

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[1] Section 13.001(a) provides:
A conveyance of real property or an interest in real property or a mortgage or deed of trust is void as to a creditor or to a subsequent purchaser for a valuable consideration without notice unless the instrument has been acknowledged, sworn to, or proved and filed for record as required by law.

Tex. Prop. Code. Ann. § 13.001(a). (West 1993).

We are not persuaded by Mr. Pipkin's argument. Instead, we agree with the district court that § 1721(g) expressly preempts Texas Property Code Section 13.001(a) to the extent Texas law would require GNMA to record its interest in the Texas mortgages to avoid Mr. Pipkin's rights as a judgment creditor.[2]

The Supremacy Clause of Article VI of the Constitution provides Congress with the power to preempt state law. "Preemption occurs when Congress expresses a clear intent to preempt in a federal statute; . . . or when state law is an obstacle to the objectives and purpose of Congress." *Kansas ex rel Todd v. United States*, 995 F.2d 1505, 1509-10 (10th Cir. 1993) (citing *Louisiana Public Serv. Comm. v. FCC*, 476 U.S. 355, 368-69 (1986)).

By explicitly stating in § 1721(g): "[n]o State or local law . . . shall preclude or limit the exercise [by GNMA] of . . . its right to enforce [its] contracts . . . or . . . its ownership rights," 12 U.S.C. § 1721(g)(1), Congress has emphatically expressed its intent to preempt any state law which would limit GNMA's rights to the mortgage pools in the event of an Issuer's default. Even requiring GNMA to record its interest in the mortgages would conflict with the power and rights granted to GNMA under its federal enabling statute.

Not only would imposition of the Texas recording statute inhibit GNMA's power to invest itself with title to the pooled mortgages, but it would also frustrate the purposes behind passage of § 1721(g). To compensate for the

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[2] We need not decide here whether Section 13.001(a) actually requires mortgage assignees to record their interest. Instead, we merely hold to the extent Section 13.001(a) so requires, it is preempted by Section 1721(g).

government's potential liability under the MBS Program, Congress sought to ensure GNMA had access to the pool of mortgages which provide the primary source of funds for the principal and interest payments. Accordingly, Congress vested GNMA with broad authority to divest defaulted Issuers' interest in the pooled mortgages.

Furthermore, imposition of the state law frustrates the congressional mandate that GNMA conduct its operations with "minimum loss to the Federal Government." 12 U.S.C. § 1716(c).[3] If the Texas recording statute could divest GNMA of the mortgages, the outstanding securities guaranteed by GNMA would no longer be "based on and backed by" the mortgages. Thus, the government would be forced to pay the investors out of general Treasury funds.

Mr. Pipkin argues GNMA can protect its interests by recording the mortgages just as any other purchaser. However, even if GNMA could protect itself by recording its interest, state law is preempted when it imposes governmental burdens exceeding the requirements of federal law. *See Baylson v. Disciplinary Bd. of the Supreme Court of Pa.*, 975 F.2d 102, 111-12 (3d Cir. 1992), *cert. denied*, 113 S.Ct. 1578 (1993) (state rule of professional conduct requiring federal prosecutors to obtain judicial approval before subpoenaing any attorney was preempted because it

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[3] 12 U.S.C. § 1716 states, in pertinent part:

> The Congress declares that the purposes of this subchapter are to establish secondary market facilities for home mortgages, to provide that the operations thereof shall be financed by private capital to the maximum extent feasible, and to authorize such facilities to . . .(c) manage and liquidate federally owned mortgage portfolios in an orderly manner, with a minimum of adverse effect upon the home mortgage market and minimum loss to the Federal Government.

imposed additional conditions not contemplated by Congress).

Although Mr. Pipkin asserts otherwise, the preemption of Section 13.001(a) harms no property interests here. Section 1721(g) does not create new mortgages, or "phantom mortgages" as Mr. Pipkin argues. The mortgages Mr. Pipkin seeks to execute upon already exist. The only question is whether GNMA or the Westmark Parties (and now Mr. Pipkin) owns the mortgages. Section 1721(g) merely resolves that question in favor of GNMA.

III.

Mr. Pipkin next contends the district court erred in granting summary judgment to GNMA and the Midland Group because GNMA failed to provide evidence of its ownership of the mortgages or to present evidence that the Westmark Parties were Issuers under the MBS Program. We disagree.

In passing upon this issue, we must review the record and consider the evidence in the light most favorable to the non-moving party. *Dreiling v. Peugeot Motors of Am., Inc.*, 850 F.2d 1373, 1377 (10th Cir. 1988). The record and the briefs amply demonstrate both the Westmark Parties' participation in the MBS Program and GNMA's ownership of the Texas mortgages.

George Anderson, a GNMA official, stated in his declaration "the Westmark Parties entered into GNMA Contracts . . . [and] were issuers under the GNMA MBS program until GNMA declared them in default . . . ." Lynn Coleman, Vice President of Northwest Bank, and Ken R. Clark, Senior Vice President of MidFirst Bank, S.S.B., and Senior Vice President of Midland Mortgage Co., stated in

their affidavits that Northwest Bank, MidFirst Bank, S.S.B., and Midland Mortgage Co. had no mortgages or other loan documents referring to the Westmark Parties other than loan documents of GNMA pooled mortgages.[4] We think this uncontroverted evidence is sufficient to show both the Issuer status of the Westmark Parties and GNMA's ownership of the mortgages.

IV.

Mr. Pipkin also contends the district court erred in granting summary judgment for GNMA and the Midland Group without honoring Mr. Pipkin's Rule 56(f) request.[5] We review a district court's denial of a Rule 56(f) motion for an abuse of discretion. *Jensen v. Redevelopment Agency of Sandy City*, 998 F.2d 1550, 1553 (10th Cir. 1993). "Under the abuse of discretion standard, a trial court's decision will not be disturbed unless the appellate court has a definite and firm conviction that the lower court made a clear error of

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[4] Mr. Pipkin argues these statements are inadmissible hearsay because they are based solely on knowledge gleaned from bank records. We disagree. Ms. Coleman's and Mr. Clark's respective positions and their personal knowledge of the banks' custodial duties in connection with GNMA's MBS Program meet the requirements of Fed., R. Civ. P. 56(e). *See, e.g., Barthelemy v. Air Lines Pilots Ass'n*, 897 F.2d 999, 1018 (9th Cir. 1990) (corporate officers' personal knowledge and competence to testify were reasonably inferred from their positions and the nature of their participation in the contested matters).

[5] Rule 56(f) provides:

> Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

judgment or exceeded the bounds of permissible choice in the circumstances." *United States v. Ortiz*, 804 F.2d 1161, 1164, n.2 (10th Cir. 1986). Here, there is no evidence the district court abused its discretion.

To invoke the protection of Rule 56(f), we have held "the party filing the affidavit must state with specificity how 'the desired time would enable [the non-moving party] to meet its burden in opposing summary judgment.'" *Jensen*, 998 F.2d at 1554 (alteration in original) (quoting *Pasternak v. Lear Petroleum Exploration, Inc.*, 790 F.2d 828, 833 (10 Cir. 1986)). Rule 56(f) "may not be invoked by the mere assertion that discovery is incomplete or that specific facts necessary to oppose summary judgment are unavailable . . . ." *Pasternak*, 790 F.2d at 833. Furthermore, " a mere assertion 'that the evidence supporting a [party's] allegation is in the hands of the [opposing party] is insufficient to justify a denial of a motion for summary judgment under Rule 56(f).'" *Weir v. Anaconda Co.*, 773 F.2d 1073, 1083 (10th Cir. 1985) (quoting *Patty Precision v. Brown & Sharpe Mfg. Co.*, 742 F.2d 1260, 1264 (10th Cir. 1984) (brackets added by *Patty Precision*) (quoting *Contemporary Mission, Inc. v. United States Postal Serv.*, 648 F.2d 97, 107 (2d Cir. 1981)).

The affidavit supporting Mr. Pipkin's Rule 56(f) request was extremely brief. In it, Mr. Pipkin's attorney stated she had twice requested GNMA to produce records or other competent evidence to support its claim of ownership of the Westmark Parties' mortgages. Mr. Pipkin's attorney then stated, "I cannot properly prosecute Mr. Pipkin's claim without the requested discovery or additional discovery as may become necessary during the pendency of this matter." This affidavit is insufficient to meet the requirements of Rule 56(f).

We have also held parties must not be "dilatory" in making Rule 56(f) requests. *Jensen*, 998 F.2d at 1554. Here, the district court found Mr. Pipkin had "ample" time to engage in discovery and neglected to use this time wisely. The record reveals Mr. Pipkin failed to file any formal discovery requests during the four-month time period prior to GNMA's motion for summary judgment. Accordingly, we cannot say the district court abused its discretion in denying Mr. Pipkin's Rule 56(f) request.

AFFIRMED.

Entered for the Court

John Porfilio Moore
Circuit Judge

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

ROGER W. PIPKIN, III, Plaintiff - Appellant,	)	
v.	)	
	)	No. 94-6443
MORTGAGE CREDITCORP, INC., and WESTMARK MORTGAGE CORPORATION, Defendant,	)	
and	)	
MIDLAND MORTGAGE CO.; MIDFIRST BANK SSB; NORTHWEST BANK, Defendants - Appellees,	)	
v.	)	
GOVERNMENT NATIONAL MORTGAGE ASSOCIATION, Third-Party-Defendant - Appellee.	)	

ORDER
Filed March 14, 1996

Before PORFILIO, BRORBY and EBEL, Circuit Judges.

The court has for consideration appellant's motion for reconsideration of this court's order of February 23, 1996, which denied the petition for rehearing as untimely.

Upon consideration whereof, the motion is granted. The petition for rehearing is considered timely filed, and is denied on the merits.

Entered for the Court

PATRICK FISHER, Clerk

/s/ Opal A. Carter
By Opal A. Carter
Deputy Clerk

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

ROGER W. PIPKIN, III, Plaintiff,	)	
vs.	)	
	)	No. CIV-94-901-W
MORTGAGE CREDITCORP, INC., et al. Defendants.	)	
MIDLAND MORTGAGE CO., MIDFIRST BANK, S.S.B., and NORTHWEST BANK, Defendants in Intervention and Third-Party Plaintiffs,	)	
vs.	)	
GOVERNMENT NATIONAL MORTGAGE ASSOCIATION, Third-Party Defendant.	)	

ORDER

This matter comes before the Court on the Motions for Summary Judgment filed by Midland Mortgage Company (Midland Mortgage), MidFirst Bank, S.S.B. (MidFirst), Northwest Bank (Northwest) (collectively "Midland") and Government National Mortgage Association (GNMA), GNMA's Motion to Quash and Dismiss Execution Proceedings, the response in opposition thereto of the

plaintiff, Roger W. Pipkin III, and Midland's reply. Based upon these submissions, the Court makes its determination.

Pipkin filed suit in the District Court of Harris County, Texas, against Mortgage Creditcorp, Inc. and Westmark Mortgage Corporation (collectively "Westmark") and on April 6, 1994, obtained a default judgment in the amount of $4,875,478.00 against said parties. Pipkin learned that Westmark held mortgages on certain properties and in May 1994, Pipkin obtained an order entitled "Turnover Order in Aid of Judgment" from the Texas court. This Order identified the mortgages to which Westmark was mortgagee and directed Midland to turn these mortgages over to Pipkin.

Pipkin then sought a writ of execution in the District Court of Oklahoma County, Oklahoma, and caused execution papers to be issued and served on Midland. Midland in turn filed a Petition in Intervention and joined GNMA as a necessary and indispensable party. GNMA removed the action to this Court.

GNMA is a government corporation within the United States Department of Housing and Urban Development. 12 U.S.C. § 1717. It operates a mortgage-backed securities program (MBS Program), the purpose of which is to attract private capital into the secondary market for home mortgages. Under the program, GNMA authorizes qualified private parties--"issuers"--to issue securities to private investors. The securities are "based on and backed by," *id.* § 1721(g)(1), groups or "pools" of federally-insured or guaranteed residential mortgages.

Issuers collect monthly mortgage payments from borrowers and transmit the appropriate amounts to the holders of the mortgage-backed securities. GNMA

guarantees that these investors will receive timely payments of principal and interest on the securities.

Issuers participating in the MBS Program are required to transfer, assign and convey to GNMA all right, title and interest in and to the mortgages, notes, other related instruments and all related payments that back the securities. They retain only nominal title and perform only certain servicing functions. *E.g.*, *Consolidated Mortgage & Finance Corp. v. Landrieu*, 493 F. Supp. 1284, 1287 (D.D.C. 1980) (assignments are in recordable form but not recorded so that nominal title remains in issuer and assists issuer in servicing duties.

It cannot be disputed that Westmark participated as an issuer in GNMA's MBS Program. As an issuer, Westmark was required to transfer, assign and otherwise convey to GNMA all right, title and interest in and to all pooled mortgages that backed securities issued by Westmark under the MBS Program. And as an issuer, Westmark retained only nominal title in the mortgages and performed only certain servicing functions with regard to the same.

On October 30, 1989, GNMA declared Westmark in default. All contracts between GNMA and issuers expressly provide that if an issuer is declared in default, all remaining right, title and interest of the issuer in any mortgages is extinguished and such mortgages became the absolute property of GNMA, subject only to the unsatisfied rights of holders of securities based on and backed by the pooled mortgages. 12 U.S.C. § 1721(g)(1). In these situations, GNMA assumes the role of "issuer" with regard to the mortgage-backed securities and makes the required payments to the holders of the securities.

After GNMA declared Westmark in default, GNMA engaged MidFirst to perform the servicing functions once performed by Westmark. Midland Mortgage assists MidFirst in these duties and Northwest has physical custody of the mortgages.

The affidavit of Ken R. Clark, Senior Vice President of MidFirst, establishes that all mortgages being serviced by MidFirst and Midland Mortgage that reflect Westmark as the mortgagee are serviced by MidFirst and Midland Mortgage on behalf of GNMA under the MBS Program. Affidavit of Ken R. Clark (August 19, 1994). The affidavit of Lynn Coleman, Vice President of Northwest, establishes that all loan documents that reflect Westmark as mortgagee are being maintained by Northwest as custodian for MidFirst, as servicer under GNMA's MBS Program and that Northwest does not possess any loan documents for mortgages that reflect Westmark as mortgagee other than as an authorized GNMA custodian for GNMA's MBS Program. Affidavit of Lynn Coleman (August 19, 1994).

Pipkin has denied that GNMA owns the mortgages in question and alternatively, has argued that GNMA's ownership is void against judgment creditors because it is unrecorded.[1] The Court disagrees.

Because the mortgages involved in this case are part of GNMA's MBS Program, once Westmark was declared in default on October 30, 1989, GNMA became absolute owner

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[1] Pipkin has argued that summary judgment is not appropriate because discovery has not yet been conducted. The Court deems the record sufficient under the circumstances to resolve the legal issues raised by the parties. Furthermore, this lawsuit was removed to this Court on June 13, 1994, and the parties have had ample time to engage in discovery pursuant to Rule 69, F.R.Civ.P., on the issues raised in the pending motions.

of the mortgages. The fact that GNMA did not record evidence of its ownership in accordance with Texas or Oklahoma recording statutes does not defeat GNMA's claim of ownership.

Section 1721(g)(1) provides that GNMA is

> "empowered . . . to provide by contract with the issuer for the extinguishment upon default of the issuer, of any . . . equitable, legal, or other right, title, or interest of the issuer in any mortgage or mortgages constituting the trust or pool against which the guaranteed securities are issued; and with respect to any issue of any guaranteed securities, in the event of default and pursuant otherwise to the terms of the contract, the mortgages that constitute such trust or pool shall become the absolute property of [GNMA] . . . . No State or local law . . . shall preclude or limit the exercise by . . . [GNMA] of (A) its power to contract with the issuer on the terms stated in the preceding sentence, (B) its rights to enforce any such contract with the issuer, or (C) its ownership rights, as provided in the preceding sentence, in the mortgages constituting the trust or pool which the guaranteed securities are issued."

12 U.S.C. § 1721(g).

Congress has clearly expressed an intent in section 1721(g)(1) to preempt state law, whether it be the law of Texas or Oklahoma. Such intent cannot be defeated by Pipkin's argument that he had no notice that GNMA has been the absolute owner of the mortgages since 1989.

Accordingly, the Court

(1) GRANTS the Motion for Summary Judgment filed by Midland Mortgage, MidFirst and Northwest on August 26, 1994;

(2) GRANTS GNMA's Motion for Summary Judgment and to Quash and Dismiss Execution Proceedings filed on September 2, 1994; and

(3) DIRECTS that judgment issue forthwith.

ENTERED this 9th day of September, 1994.

/s/ Lee R. West
LEE R. WEST
UNITED STATES DISTRICT JUDGE

ENTERED IN JUDGEMENT
DOCKET ON 11-9-94

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

ROGER W. PIPKIN, III, Plaintiff,	)	
vs.	)	No. CIV-94-901-W
MORTGAGE CREDITCORP, INC., et al. Defendants.	)	
MIDLAND MORTGAGE CO., MIDFIRST BANK, S.S.B., and NORTHWEST BANK, Defendants in Intervention and Third-Party Plaintiffs,	)	
vs.	)	
GOVERNMENT NATIONAL MORTGAGE ASSOCIATION, Third-Party Defendant.	)	

JUDGMENT

Having determined that the plaintiff is not entitled to any relief in this action from the defendants-in-intervention, the Court ORDERS that judgment should be and is hereby entered in favor of defendants-in-intervention Midland Mortgage Company, MidFirst Bank, S.S.B, and Northwest Bank and against Plaintiff Roger W. Pipkin, III. The Court further ORDERS that the third-party complaint filed by third-party plaintiffs Midland Mortgage Company, MidFirst Bank, S.S.B., and Northwest Bank against third-party defendant

Government National Mortgage Association should be and is hereby DISMISSED.

Dated at Oklahoma City, Oklahoma, this 9th day of November, 1994.

/s/ Lee R. West
LEE R. WEST
UNITED STATES DISTRICT JUDGE

ENTERED IN JUDGEMENT
DOCKET ON 11-9-94